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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BRANDEN ESCALANTE, Defendant and Appellant.	B208148 (Los Angeles County Super. Ct. No. KA071910)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles Horan, Judge. Affirmed.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Branden Escalante appeals from judgment entered following a jury trial in which he was convicted in count 1, of first degree burglary of an inhabited dwelling house (Pen. Code, § 459) with the finding that another person, other than an accomplice, was present in the residence during the commission of the offense within the meaning of Penal Code section 667.5, subdivision (c); in count 2, of first degree residential robbery (Pen. Code, § 211); in count 4, of kidnapping for ransom (Pen. Code, § 209, subd. (a)) with the finding that he personally used a deadly or dangerous weapon, to wit, a knife, within the meaning of Penal Code section 12022, subdivision (b)(1);[1] and in counts 5 and 6, of making criminal threats (Pen. Code, § 422). He was found not guilty in count 3 of attempted forcible rape (Pen. Code, §§ 664/261, subd. (a)(2)) and in counts 7 and 8 of two additional counts of making criminal threats. (Pen. Code, § 422.) Appellant admitted he had previously been convicted and served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b).

On November 9, 2006, appellant's *Marsden*[2] motion was heard and denied. On that same date he entered a plea of not guilty and not guilty by reason of insanity.

On April 19, 2007, counsel declared a doubt as to appellant's competence to stand trial and proceedings were suspended pending the result of a competency hearing.

On June 15, 2007, all counsel waived trial by jury on the issue of competency and agreed to submit the matter on the reports of appointed doctors. The court found appellant was not mentally competent to stand trial within the meaning of Penal Code section 1368 and criminal proceedings remained adjourned.

On January 11, 2008, the court received certification of mental competence from Patton State Hospital. Counsel stipulated and agreed to said report and the court found

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[1] The jury found the allegations that appellant inflicted bodily harm or intentionally confined his victim in a manner which exposed her to a substantial likelihood of death to be not true.

[2] *People v Marsden* (1970) 2 Cal.3d 118.

appellant was mentally competent to stand trial. Criminal proceedings resumed. Appellant withdrew his *Marsden* motion.

On March 24, 2008, appellant's *Marsden* motion was heard and denied. The court made the additional finding that appellant's efforts and threats toward defense counsel were done with the intent to delay and stall the trial.

On April 9, 2008, the court found that appellant had previously made threats to his attorney and that those threats posed security issues. The trial court directed the court reporter to prepare a partial transcript of the hearing to be included in the court file so that the trial court hearing the case could make a determination regarding appropriate security measures to be taken. The court appointed Dr. Gregory Cohen, M.D. pursuant to Penal Code section 1027.

On April 15, 2008, the court conducted a hearing to determine whether appellant needed to be shackled during the trial and concluded that he did.

Following a hearing pursuant to Evidence Code section 402, the court denied appellant's motion to suppress his postarrest statements finding that they were knowingly and voluntarily made and that there was a waiver of rights.

The evidence at trial established that on August 11, 2005, at approximately 2:00 p.m., N.S. and her two children, ages six and three, left their locked home on Park Lawn Road in the City of Hacienda Heights, County of Los Angeles. When they returned at approximately 3:00 p.m., Ms. S. observed that a door from her garage into the backyard and a door from her garage into the house were broken. When she exited her car, she saw appellant, carrying a gun[3] and wearing a mask and a bulletproof jacket with bullets on it, coming toward her. Ms. S. retreated to her vehicle and appellant told her not to close the car door or he would kill her. Ms. S. was frightened and screamed as did her children, who were still in the car. Holding a gun to her head, appellant told her to get out of the car. Appellant took her purse away and told her to remove the children.

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[3] The gun was later determined to be an "airsoft-type pellet gun." It was a replica of a Glock semiautomatic pistol which shoots "something akin to [plastic] bb's."

Appellant also threatened to kill her if she screamed. Using telephone cable, appellant tied Ms. S.'s and her children's hands behind their backs. He also tied cable around their feet. Appellant removed all of Ms. S.'s credit cards and belongings from her purse, removed her jewelry, and placed everything in a bag he was carrying. While holding a gun to Ms. S.'s head, he forced her and her children to walk into the house. In the master bedroom, he had them sit on the floor while he went through drawers and closets, putting items in his bag. Appellant took Ms. S. to another room and looked through her husband's papers. Appellant called someone whom appellant identified as his partner who was waiting outside. Appellant then took Ms. S. back to the master bedroom, unzipped his pants and her pants, laid down on top of her and told her he was going to rape her if she did not give him money or other items she had at her home.

When Ms. S.'s husband called on her cell phone, appellant told her not to answer the phone. When he called again, appellant told her to answer the phone and to tell him that she was busy and that she would call him later. Mr. S. became suspicious because she never talked to him that way and so he called her back repeatedly. After numerous calls, appellant took the phone and told Mr. S. his wife and children were with him and that he was demanding money within 10 or 15 minutes. Appellant threatened to kill Ms. S. and the children if Mr. S. did not comply with the demand.

Appellant tied up the children, broke the kitchen phone, and left with Ms. S., threatening the children that he would kill them if they called the police. Appellant drove Ms. S.'s car while she sat in the back seat, facing toward the back. Appellant told her not to turn her face or look in the mirror or he was going to kill her. Appellant drove at a fast rate of speed while speaking to Mr. S. on the phone. Ms. S. heard a helicopter and realized the police were behind them. Appellant threatened her many times stating that if her husband did not get the money, appellant was going to kill her. Appellant told Mr. S. that appellant was going to cut Ms. S.'s finger and then took a knife from his pocket and cut her thumb.[4] Appellant stopped the car and fled, hitting Ms. S. in the head before

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[4] Ms. S. declined medical treatment for the cut.

fleeing. Before leaving, he told Ms. S. to tell the police that he was African American and threatened that, if she accurately described him, he would kidnap her daughter from school and rape and kill her.

Appellant testified in his own defense that when he entered the house, no one was home. While in the house, he heard the garage door open and then encountered Ms. S. in the garage. He did not tie her feet, only her hands, and did not tie up the children. He admitted taking Ms. S.'s jewelry. When he entered the house with Ms. S. and her children, he intended to keep everything calm and to take a "DVD player or whatever and put it in the backpack and leave." He had not slept for approximately five days, taking drugs that kept him awake, methamphetamine and heroin. On the day of the crimes he had injected a small amount of heroin and snorted a line of methamphetamine. He did not pull Ms. S.'s pants down. Appellant called Daniel Rodriguez, who was outside the S.'s home. Rodriguez was "the brains . . . of the crime. [Appellant] was the dummy that listened to him and . . . did all the work." When appellant left the S. residence, he did not see his truck. Appellant desperately wanted to leave and was sorry about what he was doing to Ms. S. and was sorry he had gotten himself into this situation. He did not believe he said he was going to try to rape her. Appellant admitted putting his penis up against her body, fondling her breasts and touching her vagina to make her think he was going to rape her. He stopped because he never intended to do anything. Appellant denied telling Ms. S. if she told the police the truth about him he would kidnap her daughter from school and kill her. When he entered the house, he had no intention of committing a kidnap for ransom. He denied making threats to the children or trying to rape Ms. S.

Following the jury verdict, appellant withdrew his plea of not guilty by reason of insanity.

Appellant was sentenced to prison for a determinate term of ten years plus life with the possibility of parole. His sentence consisted of, in count 1, the upper term of six years; in count 2, one-third the middle term of four years, which was one year and four months; in count 4, life with the possibility of parole plus one year for the weapon

enhancement and one year for the prior prison term; in count 5, the middle term of two years; and in count 6, one-third the middle term of two years, which was eight months. Counts 2, 4, and 6 were ordered to run consecutive to count 1 and count 5 was stayed pursuant to Penal Code section 654.

At the time of sentencing, the court observed, "This case was egregious in the extreme. . . . [It had] rarely seen such gratuitous, sadistic cruelty carried out by an individual with little children who were there . . . ." The court observed appellant was "as dangerous as they come. . . . [and] as manipulative as they come."

The court found the aggravating factors to be his four prior acts of criminal behavior resulting in two sustained petitions and two adult convictions. The court further found as an aggravating factor that he was on probation at the time of the commission of the crime. The court stated there were other aggravating factors that it was not going to utilize, because doing so would create unnecessary legal issues.

Following sentencing, appellant stated he hoped "when you guys get in your garage a masked man comes out with a gun to you, too." When the court asked the reporter to make sure that was written in the record to be sent to the state prison, appellant stated, "I don't give a fuck, send it out. You punk."

After review of the record, appellant's court-appointed counsel filed an opening brief requesting this court to independently review the record pursuant to the holding of *People v. Wende* (1979) 25 Cal.3d 436, 441.

On April 30, 2009, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider.

On May 21, 2009, he filed a written response asserting he was tricked into withdrawing his plea of not guilty by reason of insanity, that during a private meeting with his lawyer he was told if he withdrew his N.G.I. plea the judge would give him 20 years and two strikes. The record indicates no promises were made and his claim is not supported by the appellate record. Issues cognizable on appeal are confined to matters contained in the appellate record. (*People v. Pearson* (1969) 70 Cal.2d 218, 222.)

Additionally, he claims that his sentence constitutes cruel and unusual punishment. We disagree. Based on the crimes committed and the fact that he terrorized Ms. S. and her young children, there is no basis for concluding imposition of the sentence constituted disproportionate or cruel and/or unusual punishment under either the California Constitution or the United States Constitution.

He also asserts he received ineffective assistance of counsel for not following through with his defense of not guilty by reason of insanity. The record indicates that while appellant was examined by three experts, there was no evidence favorable to appellant to support the plea. Appellant has failed to demonstrate ineffective assistance of counsel (see *Strickland v. Washington* (1984) 466 U.S. 668) or substantial evidence of incompetence. (See *People v. Rogers* (2006) 39 Cal.4th 826, 846.)

We have examined the entire record and are satisfied that no arguable issues exist, and that appellant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.)

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.